STATE OF MINNESOTA
DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Proposed Amendment to Minnesota Rule 5210.0150 Governing Employee Access to Exposure and Medical Records, Incorporation by Reference of Federal Standards.

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION.

This Statement of Need and Reasonableness (SONAR) discusses a proposed amendment to an existing Minnesota Occupational Safety and Health Rule governing access to employee exposure and medical records (Minnesota Rule 5210.0150) which was adopted by the Department of Labor and Industry, Occupational Safety and Health Division (hereinafter: Minnesota OSHA) on January 18, 1982. The rule incorporates by reference 29 CFR 1910.20 "Access to Employee Exposure and Medical Records" that was adopted by the Federal Occupational Safety and Health Administration (hereinafter: Federal OSHA) on May 23, 1980. In September 1988, Federal OSHA amended 29 CFR 1910.20. Those 1988 amendments are being proposed for adoption by Minnesota OSHA.

II. STATEMENT OF COMMISSIONER'S STATUTORY AUTHORITY.

Minnesota Statute § 182.657 authorizes the Commissioner of Labor and Industry "...to promulgate, in accordance with chapter 14, such rules as may be deemed necessary to carry out the responsibilities of this chapter..."

III. STATEMENT OF NEED.

Minnesota Statutes, Chapter 14 (1990) requires the commissioner to make an affirmative presentation of facts establishing the need for and reasonableness of the rules as proposed. In general terms, this means that the commissioner must set forth reasons for the proposal which are not arbitrary and capricious. However, to the extent that need and reasonableness are separate, need has come to mean that a problem exists that requires administrative attention, and reasonableness means that the solution proposed by the commissioner is appropriate. The need for the proposed rules is discussed below.

When Congress passed the Williams-Steiger Occupational Safety and Health Act of 1970 it included guidelines for states to assume responsibility for the development and enforcement of Occupational

Safety and Health Standards under an approved State Plan. One criteria that must be met is the development and enforcement of safety and health standards which are at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Federal OSHA.

Minnesota submitted a plan for the development and enforcement of state occupational safety and health standards to Federal OSHA on November 9, 1972. That plan included provisions for making changes in Minnesota's occupational safety and health program to bring it into full conformity with the requirements of Section 18 of the Occupational Safety and Health Act of 1970. The plan includes a provision that the commissioner continue to adopt Federal OSHA standards by reference or adopt state standards that are "at least as effective as" the federal standard.

Minnesota Rule 5210.0150, "Incorporation by Reference of Federal Standards," was adopted by Minnesota OSHA on January 18, 1982. This rule incorporates by reference the Federal OSHA Standard governing "Access to Employee Exposure and Medical Records," 29 CFR 1910.20. The complete text of the standard is not reprinted in Minnesota Rules since this is a Federal OSHA regulation that is published in the Federal OSHA standards manual, 29 CFR Part 1910, and is readily accessible to employers and employees.

The standard was adopted by Federal OSHA following a determination that employee exposure and medical records are critically important to the detection, treatment, and prevention of occupational disease; and workers and their representatives need direct access to this information as well as to analyses of these records. OSHA representatives also need access to this information to fulfill responsibilities under the Occupational Safety and Health Act. Employee exposure records reveal the identity of, and extent of exposure to, toxic substances or harmful physical agents. Employee medical records contain individual health status information which may indicate whether or not an employee's health is being or has been impaired by exposure to toxic chemicals or harmful physical agents.

Minnesota Rule 5210.0150 adopted 29 CFR 1910.20 by reference because workers and their representatives must play a meaningful role in detecting, treating, and preventing occupational disease. Access to exposure and medical records will enable an employee's personal physician to diagnose, treat, and possibly prevent

permanent health impairment. OSHA access to these records is crucial to the effectiveness of the Minnesota OSHA program and to maintaining the "as effective as" level of enforcement with Federal OSHA.

The proposed amendment to 5210.0150 incorporates changes to 29 CFR 1910.20 which were adopted by Federal OSHA in September 1988. The amendments are the result of Federal OSHA's experience over eight years in requiring employers to provide workers with access to records of exposure to toxic substances and medical records created in the workplace. The 1910.20 standard itself does not require employers to create medical records or conduct toxic substance exposure monitoring. What it does mandate is retention of exposure monitoring records and personal medical records that the employer is already generating. The intent is to allow employees access to their own occupational health records which are already maintained by employers and to preserve data for future epidemiological studies.

The amended rule adopted by Federal OSHA on September 29, 1988, and proposed for adoption in this rulemaking, incorporates essentially the same provisions as those in the original standard with the following major exceptions:

(1) First aid records and medical records of short-term employees are exempted from records retention requirements. In addition, the amended standard exempts from the retention requirements first aid reports (not including medical histories) of one-time treatment and subsequent observation of minor scratches, cuts, burns, splinters, and the like which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a non-physician and if maintained separately from the employer's medical program and its records.

(2) The microfilm storage of all employee X-rays except chest X-rays is permitted.

(3) Employer trade secrets are provided additional protection. The employer may withhold the specific chemical identity, including the chemical name and other specific identification of a toxic substance from a disclosable record provided that the claim that the information withheld is a trade secret can be supported,

all other available information on the properties and effects of the toxic substance is disclosed, the employer informs the requesting party that the specific chemical identity is being withheld as a trade secret, and the specific chemical identity is made available to health professionals, employees, and designated representatives as specified in the standard. In a medical emergency, an employer must immediately disclose the specific chemical identity of a toxic substance to a treating physician or nurse when needed for emergency or first aid treatment. The employer may obtain a statement of need and a confidentiality agreement as soon as circumstances permit. In non-emergency situations, requestors seeking trade secret identity must put their request in writing, describing the medical or health need for which this is requested and explain why other information (such as health risks of the chemical, proper protective measures, etc.) is insufficient. Requestors must also describe the procedures they will take to protect confidentiality, agree not to use the information except for health purposes and not to disclose the information to anyone except OSHA. Confidentiality agreements must be signed and may include a liquidated damages provision, but no penalty bond. Employer denials of requests for specific chemical identities must be in writing within 30 days of the request and must provide evidence that the information is a trade secret and explain how alternate information will suffice. The requestor can appeal the denial to OSHA.

(4) Union representatives are required to show an occupational health need for requested records when seeking unconsented access to employee exposure records.

The amendment to the standard is needed to clarify the original intent and to provide some additional flexibility to employers in responding to employee requests for this data. The amendment is also necessary to assure that employers are not retaining unnecessary records (i.e., first aid records). In addition, it is necessary for Minnesota OSHA to adopt this amendment in order to meet the mandate of remaining "at least as effective as" Federal OSHA.

STATEMENT OF NEED AND REASONABLENESS
Amendment to Minnesota Rule 5210.0150
November 5, 1992

IV. STATEMENT OF REASONABLENESS.

The proposed amendment to Minnesota Rule 5210.0150 to incorporate the September 1988 changes in 29 CFR 1910.20 "Access to Employee Exposure and Medical Records" is reasonable because it assures right of access to basic information by employees, their designated representatives, and OSHA representatives while affording appropriate confidentiality protection of trade secret requirements and eliminating from retention requirements first aid records and records of short-term employees.

This amendment is reasonable since it updates a Federal OSHA standard previously adopted by reference by Minnesota OSHA. The amendment will assure that Minnesota employees and employers are afforded the same access and protections that employees and employers in other states are provided.

Further, the amendment is reasonable because the it assures that access to employee information by a designated representative is the result of a specific written employee consent rather than a blanket release and the potential for competitive harm resulting from an unauthorized release of trade secret information is minimized.

The amendment is reasonable since it does not require the generation of additional employer records but only allows access to records the employer is already generating and maintaining. Employers who generate neither exposure not medical records will experience little or no impact from the rule. Further, the amendment provides employers with substantial flexibility in determining the methods they will use to preserve records subject to this rule and how these records will be made available to employees and their designated representatives.

V. SMALL BUSINESS CONSIDERATIONS.

Minnesota Statutes, section 14.115 (1990) requires state agencies proposing rules that affect small businesses to consider the following methods for reducing the impact of the rules on small businesses:

(a) the establishment of less stringent compliance or reporting requirements for small businesses;

(b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

(c) the consolidation or simplification of compliance or reporting requirements for small businesses;

(d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and

(e) the exemption of small businesses from any or all requirements of the rule.

Minnesota Statutes, section 14.115, subdivision 3 (1990) requires agencies to incorporate into proposed rules any of the methods listed in subdivision 2 "that it finds to be feasible, unless doing so would be contrary to the statutory objectives that are the basis for the proposed rulemaking."

Minnesota Rule 5210.0150 affects only those employers who generate exposure or medical records. Generally, these are the employers whose employees are exposed to hazardous substances and/or harmful physical agents during the course of their job responsibilities. Because the Minnesota Occupational Safety and Health Act of 1973 is intended to assure safe and healthful working conditions for all employees in the state, it is inappropriate to eliminate employees from coverage because they are employed by a small employer. Therefore, there is no exemption for small businesses from the requirements of the OSHA standards that are intended to assure employee health and safety on the job.

In this case, the impact of the proposed amendment on small businesses will be minimal since it does not require the employer to generate and maintain any additional records. It simply allows employees or their designated representatives access to medical and exposure records that the employer is already generating. In addition, the proposed amendment reduces the number of records that must be maintained (i.e., first aid records and records for short-term employees need not be kept) and allows for greater protection of confidential information (i.e., trade secret protections). In addition, because neither the original standard nor the amendment specifies the procedures or methods to be used in maintaining medical or exposure records, employers may keep the information in any arrangement, style, or format that is best for their facility.

In conclusion, an exemption, simplification, or less stringent standard for small businesses pursuant to Minnesota Statutes § 14.115, subdivision 2 (a) through (e) has been determined to be inappropriate and unwarranted.

John B. Lennes, Jr.
Commissioner